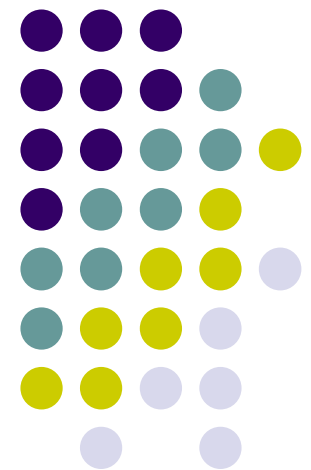
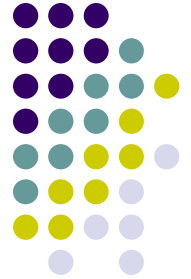


Hon. Robert H. Cleland
David Galbenski, Lumen Legal
Peter Kellett, Dykema Gossett PLLC
Jeffrey Lipps, Carpenter Lipps & Leland LLP

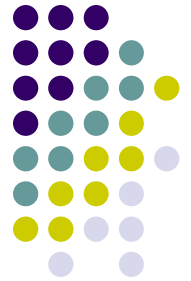
Myth vs. Reality in Electronic Discovery Practice



Panelists



The **Honorable Robert H. Cleland** (U.S. District Court for the Eastern District of Michigan) was appointed a United States District Judge by President George Bush, and was commissioned on June 19, 1990. From 1972 through 1975, he was in private practice of law in Port Huron, Michigan with his father, Delmer L. Cleland, and during those years also served part-time as an assistant prosecuting attorney for the County of St. Clair. In 1981, having been elevated through the ranks of the prosecuting attorney's office in the preceding nine years, he was elected Prosecuting Attorney and was reelected, without opposition, for two succeeding terms. In that capacity he also represented the county's civil interests in state and federal courts as the county's corporation counsel. He was the Republican candidate for Michigan Attorney General in 1986, and served as president of the Prosecuting Attorney's Association of Michigan 1988-1989.



Panelists



David Galbenski is president and CEO of Lumen Legal, a national legal staffing and services firm headquartered in Michigan. Mr. Galbenski recently authored *Unbound*, a book on the transformation of the legal services delivery model.

Panelists



Jeff Lipps has handled complex commercial litigation for more than 29 years. Much of that work involves handling disputes (both pre-litigation and actual litigation) for major corporations and financial institutions. Mr. Lipps is one of those rare commercial litigators with extensive trial experience. He is a named partner in his litigation boutique, Carpenter Lipps & Leland, which was founded in 1994. In addition to the Sixth Circuit, Mr. Lipps is admitted in the Northern and Southern District of Ohio, the Northern District of Florida, the Eastern District of Michigan, the Seventh Circuit, the Third Circuit and the Fourth Circuit. Mr. Lipps has also been regularly admitted in other courts on a *pro hac vice* basis and, in that capacity, actually handled the courtroom work in commercial actions pending in more than 20 states.



Panelists



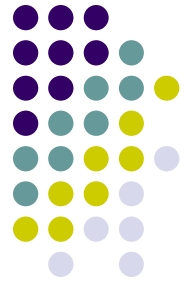
Peter M. Kellett is the Director of Dykema Gossett's Litigation Department, resident in the firm's Detroit office. His practice focuses on class action and commercial litigation; automotive, medical device, and other products liability litigation; and intellectual property litigation. Many of his cases involve the identification, retrieval, and production of electronically stored information. He has tried to verdict consumer class actions, product liability cases involving catastrophic injury or death, and business disputes.



Stages to Consider ESI Issues

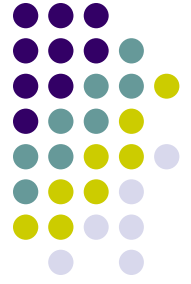


- Pre-Litigation
- Rule 16 Conference / Discovery
- Trial



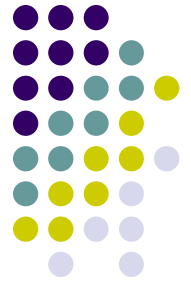
Pre-Litigation

- Acceptable/Appropriate Use
- Records Practices
- Records Retention Policies
- Litigation Holds
- The 30(b)(6) Witness



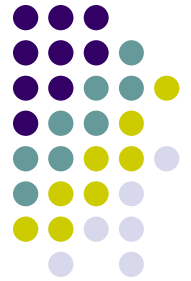
Acceptable/Appropriate Use

- **Myth:** clients are capable of controlling appropriate use of internal and external systems.
- **Reality:** employees often “cross the line,” both with the content of electronic records and with the systems by which they carry out company business.
- **Situation:** a case begins with a “toxic” email or requires extensive (and expensive) discovery of social networking sites.
- **Prevention:** help your client update its policies to encourage “thoughtful” communication, the appropriate use of company systems, and the circumstances in which non-company systems may be used for business.



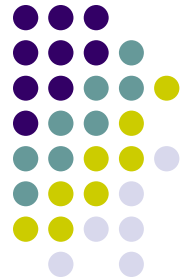
Records Practices

- **Myth:** the client's practices are fine, and you should let sleeping dogs lie.
- **Reality:** over-generation and retention of records leads to increased difficulty and expense in litigation – as well as expense at a business level.
- **Situation:** you discover that key custodians have tens of thousands of emails that respond to search terms but are non-business-related.
- **Prevention:** talk to your client about policies touching on record generation, retention, and compliance.



Record Retention Policies

- **Myth:** record retention policies are reliable predictors of what data will exist in a case.
- **Reality:** employees often disregard retention policies and both retain and destroy data according to their own needs. Clients also often use integrated delivery systems like fax-via-email and voicemail-via-email.
- **Situation:** you discover that a client's employees retained large amounts of data outside of normal policies and then destroyed it. Your opponent claims spoliation.
- **Prevention:** help your client ensure that policies are clear, complete, up-to-date, recently audited, and subject to sufficient controls.



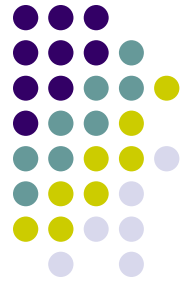
Litigation Holds

- **Myth:** a litigation hold is as simple as pressing a button.
- **Reality:** litigation holds require supervision and mechanisms set in place before litigation begins. And under recent case law, such as Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, 2010 WL 184312 (S.D.N.Y. Jan 15, 2010) written holds are **critical**.
- **Situation:** you learn, well into discovery, that a client failed to put a hold on the automatic deletion of certain data, risking Rule 37 sanctions.
- **Prevention:** Help the client plan with its IT staff how to quickly institute an electronic hold.



The 30(b)(6) Witness

- **Myth:** the client will easily be able to supply a 30(b)(6) witness for IT issues.
- **Reality:** clients are often surprised by the difficulty of selecting and preparing a witness.
- **Situation:** you receive a 30(b)(6) deposition notice with three pages of subject matters to be examined.
- **Prevention:** line up a 30(b)(6) witness in advance for use in this and future litigation.



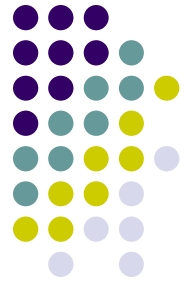
The Rule 16 Conference

- Role of ESI in the Case
- Length of Discovery
- Readily Accessible Data
- Mainframe Data
- Future Data Retention
- Asymmetrical Costs and Risks
- Custodial or General Searches
- Keywords
- Manual Searches
- Metadata
- Special Masters
- Clawback Agreements



Role of ESI in the Case

- **Myth:** every case is Enron.
- **Reality:** in most cases, ESI issues play little if any role other than being the source of printed documents shown to witnesses.
- **Situation:** hundreds of thousands of dollars spent exploring contract negotiation communications – and the issue is ultimately decided on a contract the court find unambiguous.
- **Prevention:** understand what role ESI will play in your case, and keep the process proportional to the relevance of the information.



Length of Discovery

- **Myth:** normal response periods and discovery durations work for cases that are heavy on E-discovery.
- **Reality:** parties should work out reasonable (and longer) timelines.
- **Situation:** finding out that you cannot process the company computers in time for discovery deadlines.
- **Prevention:** build in the time needed for various steps in collection, processing and review.



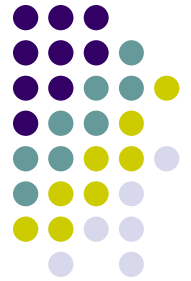
Readily Accessible Data

- **Myth:** backup “tapes” can simply be restored.
- **Reality:** backups don’t age well.
- **Situation:** promises are made in the Rule 16 conference regarding the restoration of certain tapes. When it comes time to bring the backup information back onto the system, the producing party discovers that the index is corrupt and nothing can be restored.
- **Prevention:** control this issue early in the case by appropriate designation under Rule 26.

Mainframe (Enterprise) Data



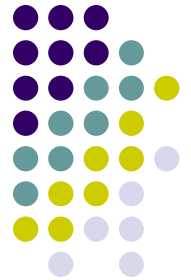
- **Myth:** centralized databases simply can be copied and produced.
- **Reality:** databases are not easily copied, transferred, or even interpreted outside their original context. Consider handling database production through queries.



Future Data Retention

- **Myth:** a party can just keep accumulating future “tapes.”
- **Reality:** “tapes” often don’t exist as discrete units, costs mount quickly, and additional tapes don’t necessarily generate additional data.
- **Situation:** one month into a case, the client’s backup systems are overrun with data, threatening loss of information relevant to your suit.
- **Prevention:** consider agreeing to normal retention (except for any litigation hold) going forward.

Asymmetrical Costs and Risks

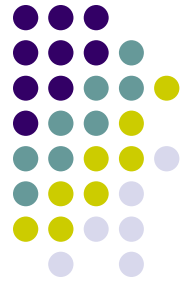


- **Myth:** it's easy for large companies to get things off their computer systems
- **Reality:** it can often cost a company more to extract the data from a single document request than the case is worth.
- **Situation:** a request in a low-value case for “any and all emails related to xyz issue” requires the searching of multiple systems, incurring hundreds of hours of IT time and the review of tens of thousands of documents.
- **Prevention:** don't be afraid to start negotiating limits early and don't be afraid to invoke, where appropriate, the “not readily accessible” designation allowed by Rule 26.



Custodial or General Searches?

- **Myth:** random searches of company-wide systems will yield manageable and useful information.
- **Reality:** random searches can miss relevant data and lead to the review of irrelevant data.
- **Situation:** terms that return responsive documents in relevant company departments generate thousands of false positives in other departments.
- **Prevention:** it's often better to start with key custodians and work out where to go from there than to be buried in search results.



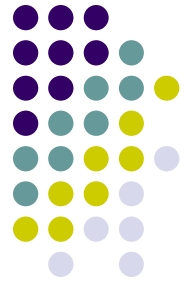
Keywords

- **Myth:** it's easy to do keyword searches
- **Reality:** the usefulness of keyword searches depends on the capabilities of the search engine(s) used and the quality of the terms. See William A. Gross Construction Associates, Inc. v. American Manufacturers Mut. Ins. Co. (S.D.N.Y. Mar. 19, 2009)
- **Situation:** it becomes clear, after a review has commenced, that a large number of documents under review were retrieved because a keyword did not work as intended.
- **Prevention:** understand how keyword searches work on company systems, and make sure you are using terms that will not generate false positives.



Manual Searches

- **Myth:** keyword searches will catch everything that is needed.
- **Reality:** keyword searches serve as a replacement for manual searches and are only as good as the theory that generates them. Parties are presumed to know how to search their own data. See Sedona Principle 6; Ford Motor Co. v. Edgewood Properties, Inc., 257 F.R.D. 418, 427 (D.N.J. 2009)
- **Situation:** expensive processing and review is carried out on the assumption that the keywords selected would draw out the right documents. At a deposition, it becomes clear that the wrong keywords were used.
- **Prevention:** consider whether the better solution is to agree to custodian-administered manual collection.



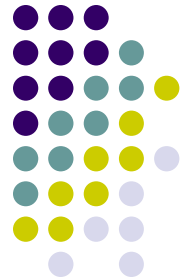
Metadata

- **Myth:** every scrap of metadata is useful.
- **Reality:** fact witnesses are often unable to testify about metadata that they haven't seen in the course of ordinary business.
- **Situation:** the parties engage in months of motion practice relating to the disclosure of more obscure categories of metadata, the parties ultimately produce it, but no use is ever made of such metadata at trial.
- **Prevention:** work with your opponent to agree on a reasonable universe of metadata.



Special Masters

- **Myth:** a federal magistrate can straighten out e-discovery disputes.
- **Reality:** federal judges have varying abilities and willingness to deal with electronic discovery, particularly on exotic issues.
- **Idea:** agree to the appointment of a special master under Fed. R. Civ. P. 53(a)(1)(A).



Clawbacks

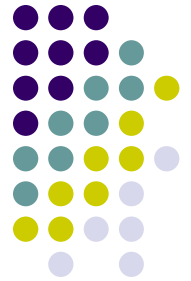
- **Myth:** privileged documents can be easily identified and removed from production – and clawbacks can always fix oversights.
- **Reality:** it is difficult if not impossible to prevent inadvertent disclosure 100% of the time. You should not rely on word searches alone. See Victor Stanley, Inc. v. Creative Pipe, Inc. (D. Md. May 29, 2008)
- **Prevention:** a reasonable clawback made part of a scheduling order [see Fed. R. Civ. P. 16(b)(3)(B)(iv)] can help cut costs, eliminate risks for both sides, and make the protection in FRE 502 effective. Lack of a clawback and failing to adequately review can lead to privilege waiver. See Infor Global Solutions v. St. Paul Fire & Marine Ins. Co. (N.D. Cal. Aug 3, 2009).



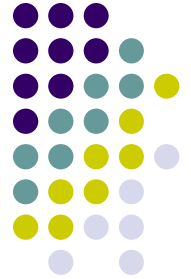
Trial

- Organizing for the Finder of Fact
- The Utility of ESI at Trial
- Stipulations re Authenticity / Admissibility

Organizing for the Finder of Fact



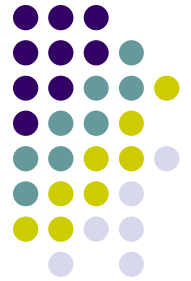
- **Myth:** juries and judges can follow you, no matter how or what you present.
- **Reality:** the finder of fact in an action needs both a framework for understanding the evidence and that evidence, presented in a logical and comprehensible way.



The Utility of ESI at Trial

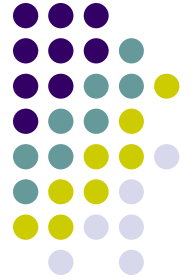
- **Myth:** ESI will be front and center at trial.
- **Reality:** in most cases, ESI does not play much of a role at all, except to the extent that it is turned into a form that witnesses can understand and discuss.

Stipulations Regarding Authenticity / Admissibility

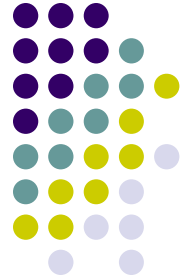


- **Myth:** authentication and admissibility issues can be handled at trial.
- **Reality:** time will be short; just as with other evidence, if you don't really have an objection, it's better to resolve any issues before you hit the courtroom.

Concluding Comments



Questions?



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